

Do I Look Fat? Perceiving Obesity as a Disability Under the Americans with Disabilities Act

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I. INTRODUCTION

In an episode of *The Simpsons* entitled “King-Size Homer,”¹ Homer Simpson intentionally puts on more than seventy pounds after reading that “hyper-obesity” qualifies as a disability under the Americans with Disabilities Act (ADA),² entitling him to work from home. His new-found girth becomes the comedic root of a litany of fat jokes, ranging from wearing a floral muumuu to his heroic struggle to eat as much and move as little as possible.³ Admittedly, *The Simpsons* is not high-brow political commentary. Often, however, it succeeds in satirizing current debates and sentiments. This specific episode hit on a particularly polarizing issue—discrimination against the obese.

More than 140 million Americans over the age of twenty are overweight.⁴ Of that number, about fifty-nine million are considered obese⁵ and are at a heightened risk for numerous dangerous health affects including heart disease, hypertension, and orthopedic complications.⁶ Furthermore,

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¹ *The Simpsons: King-Size Homer* (Fox television broadcast Nov. 5, 1995). The episode itself makes no express reference to the Americans with Disabilities Act. But the storyline demonstrates the myths and problems surrounding accommodation of disabilities in the workplace. Thus, for the purposes of this Note only, I will reference the episode as though it spoke expressly of the Act.

² The Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 328 (codified at 42 U.S.C. § 12101 *et seq.* (2000)).

³ *The Simpsons*, *supra* note 1.

⁴ American Heart Association, *Statistical Fact Sheet—Risk Factors, 2007 Update*, <http://www.americanheart.org/downloadable/heart/1168553884365OVRWGT07.pdf> (considering an individual to be “overweight” if their body mass index (BMI) is greater than 25 and “obese” if their BMI exceeds 30) (last visited Nov. 27, 2007).

⁵ The Obesity Society, *Obesity Statistics*, http://naaso.org/statistics/obesity_trends.asp (last visited Oct. 11, 2007).

⁶ The Obesity Society, *What is Obesity*, http://naaso.org/information/what_is_obesity.asp (last visited Oct. 11, 2007). It is worth noting that when the ADA was passed into law, Congress found that 43 million Americans suffered from physical and mental disabilities—clearly they were not including the obese in their figures. 42 U.S.C. § 12101(a)(1) (2006). Moreover, the Supreme Court has used this finding to justify limiting the amount of recognized disabilities. *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 484 (1999) (“This figure is inconsistent with the definition of disability pressed by petitioners.”).

America's ever-increasing size has been linked to more than one quarter of the "phenomenal growth in health care spending over the past . . . 15 years."⁷ Costs and health repercussions, however, are not the only ugly side effects of obesity. "[F]at people are stigmatized, and are the victims of tasteless jokes and assaults on their dignity. Despite evidence that 95–98% of diets fail over three years, our thin-obsessed society continues to believe that fat people are at fault for their size."⁸

Although the causes of morbid obesity are still unknown, most scientists agree that the condition is a result of more than simply eating too much and moving too little.⁹ If most of us continually overeat, we get chubby or fat, but our bodies seem to stay within a certain reasonable range regardless of outside factors.¹⁰ Many obese people, however, can sustain extraordinarily high weights while eating no more than the rest of us.¹¹ Scientists have suggested etiological, genetic, metabolic, and hormonal theories as the possible causes of morbid obesity,¹² but no one theory seems to describe every case. Nonetheless, despite medical evidence suggesting otherwise, beliefs that the obese are lazy and gluttonous persist.

Weight-based discrimination is perhaps the most prominent and accepted form of discrimination in America today.¹³ However, unlike traditionally discriminated-against groups, the obese have no specific recourse in federal

⁷ Ceci Connolly, *Obesity Gets Part of Blame for Care Costs: Early Intervention Is Key to Controlling Rising Health Spending, Study Author Says*, WASH. POST, Oct. 20, 2004, at A3 (citing an Emory University study). See also Kathryn Hinton, *Employer by Name, Insurer by Trade: Society's Obesity Epidemic and Its Effects on Employers' Healthcare Costs*, 12 CONN. INS. L.J. 137, 141–42 (2005).

⁸ NAAFA: National Association to Advance Fat Acceptance, <http://www.naafa.org> (click on "General Information," then select "Why Should I Support NAAFA?") (last visited Nov. 27, 2007).

⁹ Cecile Bouchardeau, Siobhan Nolan & Ann Reynolds, *Medical Mystery: Morbid Obesity*, ABC NEWS, Jan. 17, 2007, <http://abcnews.go.com/Health/story?id=2799700&page=1>.

¹⁰ Christine L. Kuss, Comment, *Absolving a Deadly Sin: A Medical and Legal Argument for Including Obesity as a Disability Under the Americans with Disabilities Act*, 12 J. CONTEMP. HEALTH L. & POL'Y 563, 570 (1996) (describing the "set-point" weight theory, where weight is believed to be *physiologically regulated* to maintain a certain level, and a high set-point would explain recurring obesity).

¹¹ Bouchardeau, Nolan & Reynolds, *supra* note 9.

¹² Kuss, *supra* note 10, at 568–73.

¹³ See Dennis M. Lynch, Comment, *The Heavy Issue: Weight-Based Discrimination in the Airline Industry*, 62 J. AIR L. & COM. 203, 204 (1996) ("Obesity and overweight discrimination has often been described as the last safe area of bigotry and the final acceptable form of discrimination in America.").

law.¹⁴ While several states have enacted discrimination and human rights laws that specifically address weight discrimination,¹⁵ federal anti-discrimination laws are silent on the subject. As a result, the obese have turned to existing federal anti-discrimination laws, such as the ADA, in an attempt to rectify their situation.

"King-Size Homer" was wrought with common misperceptions about obesity and the ADA. First, "hyper-obesity" is neither a condition, nor an actual word outside of *The Simpsons*.¹⁶ Qualification for protection under the ADA is not as simple as reaching a pre-determined weight. It is established on a case-by-case basis¹⁷ and requires a complicated analysis of the individual's particular condition. Second, studies of children's perceptions of the obese have shown that many young people would rather be disfigured or missing a limb than obese,¹⁸ so it is doubtful that anyone but Homer would seek this condition. Finally, although there is case law on both sides, Congress and the Supreme Court have yet to directly address whether

¹⁴ See Jane Byeff Korn, *Fat*, 77 B.U.L. REV. 25, 28 (1997) (discussing the difficulties faced by the obese attempting to combat discrimination).

¹⁵ For example, Michigan's Elliot-Larson Civil Rights Act provides that an employer may not "[l]imit, segregate, or classify an employee or applicant for employment in a way that deprives . . . the employee or applicant of an employment opportunity . . . because of religion, race, color, national origin, age, sex, height, weight, or marital status." MICH. COMP. LAWS ANN. § 37.2202 (West 2001) (emphasis added). See also D.C. CODE ANN. § 2-1402.11(a) (LexisNexis 2007).

¹⁶ See *The Simpsons*, *supra* note 1.

¹⁷ See, e.g., *Torcasio v. Murray*, 57 F.3d 1340, 1343–44 (4th Cir. 1995) (holding that obesity is not a clearly established disability under the ADA and implying that it may be found to be disabling on a case-by-case basis).

¹⁸ See Stephen A. Richardson et al., *Cultural Uniformity in Reaction to Physical Disabilities*, 26 AM. SOC. REV. 241 (1961). A 1957 study of children's perceptions "showed a consistent preference pattern in evaluating various physical disabilities." *Id.* at 241. The subjects were ten- to eleven-year-old children from varying social and cultural backgrounds. *Id.* at 242. The children were asked to preferentially rank photographs of the following: a child with no physical handicap, a child with crutches and a leg brace, a child in a wheelchair, a child missing his left hand, a child with a facial disfigurement, and an obese child. *Id.* at 243–45. With alarming consistency, the children ranked obesity as the least desirable trait, well below the photos with missing limbs and facial disfigurements. *Id.* at 243–47.

However, with the ever-increasing rates of obesity among children, there is some evidence that the younger generation is becoming more accepting of the obese. See Jodi Kantor, *To Report-Card Woes, Add Body-Mass Blues*, INT'L HERALD TRIB., Jan. 8, 2007, at 2 (interviewing an obese homecoming queen who does not view her condition as socially stigmatized), available at <http://www.iht.com/articles/2007/01/08/healthscience/web.0108obesity.php> (appearing under headline *As Obesity Fight Hits Cafeterias in the U.S., Many Fear a Note from School*).

obesity, specifically morbid obesity,¹⁹ would be considered a disability under the ADA. Instead, challenges to obesity discrimination in the workplace under the ADA have been decided on a fact-specific basis by lower courts,²⁰ creating a web of confusing and sometimes contradictory jurisprudence.

This Note follows the development of obesity claims, first under state anti-discrimination laws, then under the ADA since its passage in 1990.²¹ It focuses specifically on obesity discrimination claims in employment under Title I of the ADA,²² where the employer is accused of regarding or perceiving the obese individual as having a disability. Part II provides an introduction to the ADA and a roadmap for protection qualification under the statute. Part III outlines the history of obesity discrimination suits under state discrimination laws and the ADA, including a brief discussion of obesity discrimination in the airline industry. Part IV addresses the current state of obesity suits brought under the “perceived disability” definition in the ADA,²³ specifically focusing on the most recent case of *EEOC v. Watkins Motor Lines, Inc.*²⁴ Finally, Part V discusses the ramifications of including morbid obesity as a matter of law and suggests that weight-based discrimination is best addressed through the perceived disability definition.

II. INTRODUCTION TO THE ADA

The Americans with Disabilities Act of 1990 was intended to expand the scope of the Rehabilitation Act (RA) of 1973²⁵ into the private sector. While the RA provides protection for handicapped individuals²⁶ against

¹⁹ According to the National Institutes of Health online medical encyclopedia, morbid obesity refers to patients who are 50–100%, or 100 pounds, above their ideal weight. See MedlinePlus: Trusted Health Information for You, <http://www.nlm.nih.gov/medlineplus/ency/article/007297.htm> (Medical Encyclopedia provided by U.S. National Library of Medicine and National Institutes of Health) (last visited Nov. 27, 2007).

²⁰ *Cox v. Carrier Sales & Distrib.*, No. 3:04-CV-527, 2006 U.S. Dist. LEXIS 49705, at *35 (E.D. Tenn. Jul. 20, 2006) (noting that, even for obesity “[w]hether a person has a disability under the ADA is an individualized inquiry”) (quoting *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 483 (1999)).

²¹ 42 U.S.C. § 12101 *et seq.* (2000).

²² *Id.*

²³ 42 U.S.C. § 12102(2)(C) (2000). This definition will be discussed in depth *infra* Parts IV–V.

²⁴ *EEOC v. Watkins Motor Lines, Inc.*, 463 F.3d 436 (6th Cir. 2006).

²⁵ Rehabilitation Act of 1973, 29 U.S.C. § 794 (2000).

²⁶ The term “disability” as it is used in the ADA “is comparable to the definition of the term ‘individual with handicaps’ in the section 7(8)(B) of the Rehabilitation Act of 1973 The use of the term ‘disability’ instead of ‘handicap’ . . . represents an

discrimination by federal agencies and “any program or activity receiving Federal financial assistance,”²⁷ Title I of the ADA protects employees with disabilities against discrimination by any employer with fifteen or more workers.²⁸ Although these two Acts cover different employers, the definitions used to analyze their coverage are identical.²⁹ Therefore, obesity discrimination cases brought under the two Acts are analyzed interchangeably.³⁰

The ADA provides that no “covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to [employment practices].”³¹ Discriminatory practices under the ADA include the failure to provide reasonable accommodations to an otherwise qualified individual with a disability, unless that “accommodation would impose an undue hardship on the operation of” that business.³² In order to qualify for the ADA’s protection, the aggrieved party has the burden of proving that he or she has a disability within the definition

effort . . . to make use of up-to-date, currently accepted terminology.” H.R. REP. NO. 101-485, pt. 2, at 50 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 303, 332.

²⁷ 29 U.S.C. § 794(a) (2000).

²⁸ 42 U.S.C. § 12111(5) (2000):

(A) In general. The term “employer” means a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such person, except that, for two years following the effective date of this subchapter, an employer means a person engaged in an industry affecting commerce who has 25 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding year, and any agent of such person.

(B) Exceptions. The term “employer” does not include—

(i) the United States, a corporation wholly owned by the government of the United States, or an Indian tribe; or

(ii) a bona fide private membership club (other than a labor organization) that is exempt from taxation under section 501(c) of title 26.

²⁹ H.R. REP. NO. 101-485, pt. 2, at 23 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 303, 332 (“The ADA incorporates many of the standards of discrimination set out in regulations implementing section 504 of the Rehabilitation Act of 1973 . . .”). The definition used in the RA to define a handicapped individual is practically identical to that used in the ADA to define a person with a disability. *Compare* 42 U.S.C. § 12102(2) (2000) (outlining the ADA’s definition of “disability”), *with* 29 U.S.C. § 705(20)(A) (2000) (defining “individual with a disability” in the RA).

³⁰ *See, e.g., Andrews v. Ohio*, 104 F.3d 803, 807 (6th Cir. 1997) (“Because the standards under both of the acts are largely the same, cases construing one statute are instructive in construing the other.”).

³¹ 42 U.S.C. § 12112(a) (2000).

³² 42 U.S.C. § 12112(b)(5)(A) (2000).

of the statute, and that he or she is otherwise qualified for the job.³³ Contrary to *The Simpsons* episode,³⁴ in reality it is very unlikely that Homer would have qualified as a person with a disability,³⁵ and therefore would not have been entitled to the reasonable accommodation of working from home. In fact, qualifying as an individual with a disability has been the largest hurdle for the obese seeking protection in the courts.³⁶

A. Disability Under the ADA

The ADA separates "disability" rather broadly into three separate categories.³⁷ An individual has a disability for purposes of the ADA if he or she has "a physical or mental impairment that substantially limits one or more . . . major life activities,"³⁸ has "a record of such an impairment,"³⁹ or if he or she is "regarded as having such an impairment."⁴⁰ All three of these definitions refer to an impairment that substantially limits a major life activity⁴¹ and, therefore, beg the questions: What is an impairment? What is a major life activity? And, what does it mean to be substantially limited? Unfortunately, the ADA does not provide the answers. Instead, courts applying the statute have turned to implementing regulations—in particular those promulgated by the Equal Employment Opportunity Commission (EEOC).⁴²

³³ See generally *Ennis v. Nat'l Ass'n of Bus. & Educ. Radio, Inc.*, 53 F.3d 55, 58 (4th Cir. 1995) (holding that the plaintiff has the burden of proving a prima facie case of discrimination before the burden shifts to the covered entity).

³⁴ See *supra* Part I (discussing the "King-Size Homer" episode of *The Simpsons*).

³⁵ Homer would likely not be able to show that his obesity substantially limited a major life activity, and thus would not have qualified as a person with a disability under the statute. See 42 U.S.C. § 12102(2)(A) (2000).

³⁶ See *infra* Part III (discussion of obesity discrimination cases in federal courts).

³⁷ 42 U.S.C. § 12102(2) (2000).

³⁸ *Id.* § 12102(2)(A).

³⁹ *Id.* § 12102(2)(B).

⁴⁰ *Id.* § 12102(2)(C).

⁴¹ In *Sutton v. United Air Lines, Inc.*, the Supreme Court explained that the last two definitions refer to either having a record of, or being regarded as having, "a physical or mental impairment that substantially limits one or more of the major life activities of such individual." *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 489 (1999).

⁴² In fact, the EEOC has the burden of "issu[ing] regulations to carry out Title I and [providing] for enforcement of the provisions." H.R. REP. NO. 101-485, pt. 2, at 143 (1990), as reprinted in 1990 U.S.C.C.A.N. 303, 332. Although courts are not required to follow these regulations, they are widely cited in discrimination cases.

The EEOC has defined “physical or mental impairment” to mean “[a]ny physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitor-urinary, hemic and lymphatic, skin, and endocrine”⁴³ Courts applying this definition have made efforts to distinguish recognized disabilities from mere physical characteristics.⁴⁴ This distinction has posed a formidable hurdle to the recognition of obesity as a disability, as it is often viewed as simply an undesirable physical trait. Neither the courts nor Congress intended for the ADA to provide protection against appearance-based discrimination.⁴⁵

The ADA does not address obesity as a disability, neither in its text nor in its legislative history. In fact, only the EEOC has addressed the question of whether obesity would qualify as an impairment. In the appendix to section 1630, which contains the EEOC’s definition of impairment, it states that “[t]he definition of the term ‘impairment’ does not include physical characteristics such as eye color, hair color, left-handedness, or height, *weight* or muscle tone that are within ‘normal’ range and are not the result of a physiological disorder.”⁴⁶ Although on its face this language seems to

⁴³ 29 C.F.R. § 1630.2(h)(1) (2007). The regulation defining impairment for the RA employs the same language with one small difference—it removes the comma after “physiological disorder.” 34 C.F.R. § 104.3(j)(2)(i)(A) (2006) (“any physiological disorder or condition”). Though perhaps just a scrivener’s error, at least one appellate judge has pointed out that the effect of this difference is that in the RA, a potential plaintiff need not prove a physiological cause for a condition, as the word physiological would only modify disorder. *See* EEOC v. Watkins Motor Lines, Inc., 463 F.3d 436, 443–44 (6th Cir. 2006) (Gibbons, J., concurring). To date, however, courts have applied the definitions interchangeably, especially in light of the EEOC’s stated intent to adopt “the definition of the term ‘physical or mental impairment’ found in the regulations implementing section 504 of the Rehabilitation Act” *See* Equal Employment Opportunity for Individuals with Disabilities, 56 Fed. Reg. 35,726, 35,740–41 (July 26, 1991) (codified at 9 C.F.R. pt. 1630).

⁴⁴ *See, e.g.,* Andrews v. Ohio, 104 F.3d 803, 808 (6th Cir. 1997) (citing 29 C.F.R. app. § 1630.2(h)).

⁴⁵ H.R. REP. NO. 101-485, pt. 2, at 51–52 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 303, 332.

⁴⁶ 29 C.F.R. app. § 1630.2(h) (2007) (emphasis added). *See also id.* app. § 1630.2(j) (noting that “except in rare circumstances, obesity is not considered a disabling impairment”). No agency has been given express authority to interpret or promulgate regulations defining the term “disability.” *Sutton*, 527 U.S. at 479. Therefore, the EEOC’s regulations are arguably not entitled to much weight. However, courts confronted with obesity discrimination suits under the ADA have consistently cited to these regulations as indications of congressional intent. *See Andrews*, 104 F.3d at 808; *Cook v. R.I. Dep’t of Mental Health, Retardation, & Hosps.*, 10 F.3d 17, 25 (1st Cir. 1993); *Smaw v. Va. Dep’t of State Police*, 862 F. Supp. 1469, 1474–75 (E.D. Va. 1994).

imply that weight which is beyond the "normal range," such as morbid obesity, may qualify as an impairment, courts have cited this definition as support for a more narrow reading of impairment in the obesity context.⁴⁷

Further, plaintiffs attempting to state a case under the ADA must show that their impairment "substantially limits one or more of [their] major life activities."⁴⁸ This requirement really requires two findings: 1) a substantial limitation 2) of a major life activity.⁴⁹ Major life activities include basic functions such as "caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."⁵⁰ If the individual's condition qualifies as an "impairment," and it affects a major life activity, the court must determine whether its effect is substantial.⁵¹

The EEOC regulations define "substantially limits" as either "[u]nable to perform a major life activity that the average person . . . can perform,"⁵² or "[s]ignificantly restricted as to the condition, manner or duration under which [the] individual can perform a particular major life activity [compared to the average person]."⁵³ The Supreme Court has interpreted the major life activity requirement strictly in at least two instances: performing manual tasks and working.

In *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*,⁵⁴ the Supreme Court held that to be substantially limited in the major life activity of performing manual tasks, "an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives."⁵⁵ The Court went on to note that if Congress had intended to qualify everyone that was precluded from performing some isolated, unimportant manual task as having a disability,

⁴⁷ See, e.g., *Watkins Motor Lines, Inc.*, 463 F.3d at 442 (holding that morbid obesity, without a physiological cause, is not an impairment); *Francis v. City of Meriden*, 129 F.3d 281, 286 (2d Cir. 1997). Neither of these cases considered whether morbid obesity, as a matter of law, had a physiological cause. Instead, they looked to the individual plaintiffs to carry that burden.

⁴⁸ 42 U.S.C. § 12102(2)(A) (2000).

⁴⁹ See *Smaw*, 862 F. Supp. at 1472 ("Smaw must show that she was discriminated against because she had, or was regarded by her employer as having, (1) a physical or mental impairment; (2) that limits a major life activity; and (3) the limitation is substantial.").

⁵⁰ 29 C.F.R. § 1630.2(i) (2007).

⁵¹ See *Murphy v. United Parcel Serv., Inc.*, 527 U.S. 516, 523 (1998).

⁵² 29 C.F.R. § 1630.2(j)(1)(i) (2007).

⁵³ 29 C.F.R. § 1630.2(j)(1)(ii) (2007).

⁵⁴ *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184 (2002).

⁵⁵ *Id.* at 198.

the number of Americans with disabilities referred to in the ADA's enactment⁵⁶ would have been much higher.⁵⁷

A restrictive reading has also been given to the major life activity of working, where the Supreme Court has held that the individual's impairment must preclude or substantially limit his ability to perform a "class of employment," as opposed to one particular job.⁵⁸ So, while there are a host of activities that may qualify as major life activities, the real hurdle appears to be whether that activity is substantially limited by the impairment.

For an individual to qualify as a person with a disability under the first prong of the ADA's definition, then, he or she has the burden of proving that he: 1) has an impairment; 2) that affects a major life activity; and 3) that the effect of that impairment is substantial.⁵⁹ Similarly, under the second prong of the ADA's definition,⁶⁰ the individual is considered to have a disability only if he or she has a record of such an impairment that has substantially limited a major life activity.⁶¹ In other words, he must show that he has suffered from such an impairment in the past. The third prong, and the focus of this Note, departs somewhat from the above analysis.

Often referred to as either the "regarded as" or "perceived disability" prong,⁶² the ADA's third definition of disability protects those employees or potential employees who have been "regarded as having such an impairment."⁶³ The EEOC has interpreted this definition to mean:

⁵⁶ 42 U.S.C. § 12101(a)(1) (2000) ("[S]ome 43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing as the population as a whole is growing older.").

⁵⁷ *Toyota Motor Mfg.*, 534 U.S. at 197.

⁵⁸ *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 490 (1999). In fact, the Court held that "[t]o be substantially limited in the major life activity of working, then, one must be precluded from more than one type of job, a specialized job, or a peculiar job of choice." *Id.* In other words, an individual is not substantially limited in the major life activity of working if he cannot perform the job at issue. He is only substantially limited if he could not perform an entire class of jobs. *Id.*

⁵⁹ 42 U.S.C. § 12102(2)(A) (2000) (defining "disability" as "a physical or mental impairment that substantially limits one or more of the major life activities of such individual").

⁶⁰ 42 U.S.C. § 12102(2)(B) (2000) (qualifying an individual as a person with a disability if they have a record of such an impairment).

⁶¹ Although there appears to be little litigation under this definition, the EEOC regulations specify that having a record of an impairment "means [the person] has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities." 29 C.F.R. § 1630.2(k) (2007).

⁶² See, e.g., Amy M. Frisk & Charles B. Hernicz, *Obesity As a Disability: An Actual or Perceived Problem?*, ARMY LAW., May 1996, at 3, 13-19.

⁶³ 42 U.S.C. § 12102(2)(C) (2000).

- (1) Has a physical or mental impairment that does not substantially limit major life activities but is treated by a covered entity as constituting such limitation;
- (2) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or
- (3) Has none of the impairments defined in paragraph (h) (1) or (2) of this section but is treated by a covered entity as having a substantially limiting impairment.⁶⁴

The first two definitions require a finding of an impairment, the third does not. The Supreme Court found in *Sutton v. United Air Lines, Inc.*⁶⁵ that there were only two ways that an individual could fall within the "regarded as" definition: "(1) a covered entity mistakenly believes that a person has a physical impairment that substantially limits [a major life activity], or (2) a covered entity mistakenly believes that an actual, non-limiting impairment substantially limits [a major life activity]."⁶⁶ The first *Sutton* definition seems to encompass subsection (3) of the EEOC's regulation above, and would not require the finding of an actual impairment.⁶⁷ The Court went on to cite the EEOC's regulation which acknowledged that, in creating this definition, Congress intended to protect against the "'myths, fears and stereotypes' associated with disabilities."⁶⁸

Under the "regarded as" prong, the aggrieved individual need not satisfy the requirements for proving a disability as under the first two definitions. Instead, they are protected by the ADA against discrimination by employers who believe their condition to be disabling, when in fact it is not.⁶⁹ In passing the ADA, Congress acknowledged that "[t]his third prong is particularly important for individuals with stigmatic conditions that are viewed as physical impairments but do not in fact result in a substantial limitation of a major life activity."⁷⁰ In other words, its purpose is to protect individuals against "society's accumulated myths and fears about disability

⁶⁴ 29 C.F.R. § 1630.2(l)(1)-(3) (2007).

⁶⁵ *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999).

⁶⁶ *Id.* at 489.

⁶⁷ This is in line with Congress's intent to include "not only those who are actually physically impaired but also those who are regarded as impaired . . ." H.R. REP. NO. 101-485, pt. 2, at 53 (1990), as reprinted in 1990 U.S.C.C.A.N. 303, 332.

⁶⁸ *Sutton*, 527 U.S. at 490 (citing 29 C.F.R. § app. 1630.2(l)).

⁶⁹ *Sutton*, 527 U.S. at 489.

⁷⁰ H.R. REP. NO. 101-485, pt. 2, at 53 (1990), as reprinted in 1990 U.S.C.C.A.N. 303, 332.

and diseases [that] are as handicapping as are the physical limitations that flow from actual impairment.”⁷¹

It is under this third prong of the ADA’s definition of disability that obesity discrimination claims appear to have had the most success in achieving recognition. Although the analysis itself proceeds on a case-by-case basis, courts have been very reluctant to recognize obesity as an actual impairment on its own—even though recognizing it would still require the obese individual to prove that they were “otherwise qualified”⁷²—and more sympathetic to claims brought under the perceived disability definition.⁷³

B. Even Disabled Individuals Must be Qualified for the Job

The ADA provides protection to a “qualified individual with a disability” against workplace discrimination.⁷⁴ Therefore, not only must the individual prove that he has a disability under one of the three definitions above, but he must also show that he is otherwise qualified for the position from which he has been denied or wrongfully terminated.⁷⁵ Only then will the ADA’s protection apply.

A qualified individual with a disability is “an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.”⁷⁶ The ADA itself does little to illuminate the meaning of “essential functions.” EEOC regulations provide some guidance, noting that it “does not include the marginal functions of the position.”⁷⁷ Case law, however, has made it clear that the courts will not use the ADA to protect individuals with

⁷¹ H.R. REP. NO. 101-485, pt. 2, at 53 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 303, 332. *See also* Sch. Bd. of Nassau County, Fla. v. Arline, 480 U.S. 273, 277–80 (1987) (discussing Congress’s intent in amending the RA language to include protection from discrimination and misperceptions).

⁷² 42 U.S.C. § 12112(b)(5)(A) (2000).

⁷³ *See infra* Part III.

⁷⁴ 42 U.S.C. § 12112(b)(5)(A) (2000).

⁷⁵ In addition to showing that he or she is a person with a disability under the definition and is qualified with or without reasonable accommodation, a *prima facie* case of discrimination under the ADA requires additional showings that the plaintiff was subject to adverse employment action as the sole result of his disability. This final requirement can be shown indirectly if the plaintiff was either replaced by a person without a disability or treated less favorably than other nondisabled employees. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

⁷⁶ 42 U.S.C. § 12111(8) (2000).

⁷⁷ 29 C.F.R. § 1630.2(n)(1) (2007).

disabilities who are not, or who are no longer, qualified for the job they hope to get or are holding.⁷⁸

For example, Robert McDonald was released from his position as a correctional officer when he could no longer fulfill the physical demands of his job.⁷⁹ At the time he began his employment, he weighed 400 pounds.⁸⁰ To accommodate his size, the department ordered special uniforms and chairs, and accorded him temporary light duty.⁸¹ After suffering congestive heart failure, McDonald's doctor restricted him from walking more than one hundred feet, standing more than fifteen minutes, stepping, and lifting objects that required two hands.⁸² Shortly thereafter, McDonald was released from his duties due to the department's inability to accommodate his condition.⁸³ He brought suit under the ADA claiming "that he suffered from multiple . . . disabilities . . . and that he required and requested reasonable accommodations which defendant refused to provide."⁸⁴ The department admitted that McDonald had a disability within the definition; instead it argued that he was not otherwise qualified to perform the essential functions of his position.⁸⁵ The court agreed. The essential functions of the position required McDonald to be responsible for safety, stand for long periods of time, and respond quickly to emergencies.⁸⁶ It was McDonald's burden to prove that a certain accommodation would be reasonable, and that given the accommodation, he could perform the essential functions of the job.⁸⁷ McDonald did not meet this burden.⁸⁸ Therefore, although McDonald had a disability, he was not qualified for the position and, therefore, not protected by the ADA.⁸⁹

McDonald's situation also illuminates the limits of reasonable accommodations. An assessment of an individual's ability to perform the essential functions of the position assumes that the employer can make

⁷⁸ See, e.g., *McDonald v. Dep't of Corr.*, 880 F. Supp. 1416, 1423-24 (D. Kan. 1995).

⁷⁹ *Id.*

⁸⁰ *Id.* at 1419.

⁸¹ *Id.*

⁸² *Id.*

⁸³ *McDonald*, 880 F. Supp. at 1421.

⁸⁴ *Id.*

⁸⁵ *Id.* at 1422.

⁸⁶ *Id.* at 1419.

⁸⁷ *Id.* at 1423.

⁸⁸ *McDonald*, 880 F. Supp. at 1424.

⁸⁹ *Id.* at 1423.

reasonable accommodations to assist that individual.⁹⁰ A reasonable accommodation is one that does not impose an undue hardship on the operation of the business.⁹¹ If the individual with a disability can perform the essential functions of the job only at significant expense and hardship to the business,⁹² he is not qualified for the job and will not receive the ADA's protection.⁹³

Discrimination aside, qualification itself under the ADA poses a substantial obstacle for the obese seeking its protection. Not only must a potential plaintiff show that he has an impairment—either an actual impairment or perceived impairment⁹⁴—but he must also show that the impairment substantially limited, or was regarded as substantially limiting, one of his major life activities.⁹⁵ Finally, he must prove that he is qualified for the job by showing that he could perform the essential functions of the position with or without reasonable accommodations.⁹⁶ In fact, most of the analysis of obesity under the ADA has focused on the qualification standards.⁹⁷ If a plaintiff manages to satisfy all of the above, the process of proving discriminatory practices requires only a showing that the plaintiff was fired or denied employment because of his or her disability.⁹⁸

⁹⁰ 42 U.S.C. § 12111(8) (2000) (defining qualified individual with a disability as one who can perform the essential functions of the job “with or without reasonable accommodation”). His ability to perform, then, is assessed in light of any accommodations he may need.

⁹¹ 42 U.S.C. § 12112(b)(5)(A) (2000). The term “undue hardship” is defined as an action that imposes “significant difficulty or expense” on the business. 42 U.S.C. § 12111(10)(A) (2000).

⁹² 42 U.S.C. § 12111(10)(A) (2000).

⁹³ Again, the ADA only provides protection for a qualified individual with a disability. An individual is only qualified if they can perform the essential functions of the job with reasonable accommodations. The reasoning, then, is that if the accommodations needed are not reasonable, because they impose an undue hardship on the business, the individual is not qualified, and the ADA does not apply. 42 U.S.C. § 12102 *et seq.* (2000).

⁹⁴ 42 U.S.C. § 12102(2) (2000).

⁹⁵ *Id.*

⁹⁶ 42 U.S.C. § 12111(8) (2000).

⁹⁷ See, e.g., *Andrews v. Ohio*, 104 F.3d 803 (6th Cir. 1997); *Tudyman v. United Airlines*, 608 F. Supp. 739 (C.D. Cal. 1984).

⁹⁸ See generally *Raytheon Co. v. Hernandez*, 540 U.S. 44 (2003) (discussing the burdens of proof for plaintiffs and employers in ADA discrimination suits).

[A] plaintiff must first establish a *prima facie* case of discrimination. The burden then shifts to the employer to articulate a legitimate, nondiscriminatory reason for its employment action. If the employer meets this burden, the presumption of intentional discrimination disappears, but the plaintiff can still prove disparate

III. THE CONFUSED HISTORY OF OBESITY SUITS UNDER THE ADA

Due to the lack of specific federal protection, the ADA and the RA have been the most common vehicles used by the obese to combat discrimination in the workplace.⁹⁹ The success of these suits seems to depend, largely, on which definition of "disability" the plaintiff is attempting to prove. The outcome of earlier state cases on obesity discrimination brought under the state disability definitions depended upon how broad the state read its definition of disability.¹⁰⁰ Later cases, however, where the focus was on whether the condition was perceived as disabling, were more successful.¹⁰¹ Although there is case law on both sides, it appears that obesity suits brought under the perceived disability definition have had the most success, and attempts to prove that obesity itself is a disability have been met with more skepticism.¹⁰²

A. State Cases Discussing Obesity as a Disability

One of the earliest cases discussing obesity as a disability, *Greene v. Union Pacific Railroad*¹⁰³ found that the plaintiff's condition did not qualify as a disability because it was "not an immutable condition such as blindness or lameness."¹⁰⁴ *Greene* was denied a transfer into a fireman position because of his morbid obesity.¹⁰⁵ The court found that his condition was not a disability because his weight "seemed to vary according to the motivation that he had for controlling [it]."¹⁰⁶ *Greene* was brought under the auspices of

treatment by . . . offering evidence demonstrating that the employer's explanation is pretextual.

Id. at 49 n.3 (citations omitted).

⁹⁹ See Carol R. Buxton, *Obesity and the Americans with Disabilities Act*, 4 BARRY L. REV. 109, 109-14 (2003).

¹⁰⁰ William C. Taussig, Note, *Weighing in Against Obesity Discrimination: Cook v. Rhode Island, Department of Mental Health, Retardation, and Hospitals and the Recognition of Obesity as a Disability Under the Rehabilitation Act and the Americans With Disabilities Act*, 35 B.C. L. REV. 927, 941-45 (1994).

¹⁰¹ See, e.g., *Cook v. R.I. Dep't of Mental Health, Retardation, & Hosps.*, 10 F.3d 17 (1st Cir. 1993).

¹⁰² Compare *Cook*, 10 F.3d at 17 (holding that the plaintiff was perceived as a person with a disability under the Act), with *Andrews*, 104 F.3d at 803 (holding that the plaintiffs did not prove that their obesity was a disability).

¹⁰³ *Greene v. Union Pac. R.R. Co.*, 548 F. Supp. 3 (W.D. Wash. 1981).

¹⁰⁴ *Id.* at 5.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

Washington State's anti-discrimination laws.¹⁰⁷ The assumption that immutability is a necessary attribute of a disability was a common defense to state law obesity disability claims but has been largely rejected in ADA and RA suits.¹⁰⁸

New York confronted and dismissed the immutability argument in *McDermott v. Xerox*,¹⁰⁹ where it noted that the state statute¹¹⁰ protected all individuals with disabilities, "not just those with hopeless conditions."¹¹¹ When the complainant, Ms. McDermott, was denied a job as a systems consultant on the basis of her weight alone,¹¹² the court determined that her obesity was an actual disability under New York law¹¹³ and granted her relief.

The Supreme Court of North Dakota, however, has found that "the mere assertion that one is overweight or obese is not alone adequate to make a [claim of disability]."¹¹⁴ In *Krein v. Marian Manor Nursing Home*, Krein,

¹⁰⁷ *Id.*

¹⁰⁸ See *Cook*, 10 F.3d at 23 (holding that the assertion that mutable traits are not impairments under the RA "is as insubstantial as a pitchman's promise"). In fact, there is a large amount of scientific research tending to prove that once a person becomes morbidly obese, his body composition changes, and it becomes extremely difficult for them to lose and to keep off the weight. See Kuss, *supra* note 10, at 570 (arguing that a high "set point" weight, based on a theory which analyzes "[t]he ability of humans to maintain remarkably stable body core temperatures and . . . glucose . . . despite extreme variations in environmental conditions," could explain an obese individual's inability to lose weight).

¹⁰⁹ *McDermott v. Xerox Co.*, 480 N.E.2d 695 (N.Y. 1985).

¹¹⁰ This case was brought under New York State's Human Rights Law, which at the time defined disability as "a physical, mental or medical impairment resulting from anatomical, physiological or neurological conditions with [sic] prevents the exercise of a normal bodily function or is demonstrable by medically accepted clinical or laboratory diagnostic techniques" *Id.* at 696.

¹¹¹ *McDermott*, 480 N.E.2d at 698.

¹¹² *Id.* at 696.

¹¹³ The court noted that the state law in this case had a much broader definition of disability than the ADA or RA in that it provided coverage for "medical impairments" in addition to physical and mental impairments. *Id.* at 698. Ms. McDermott's obesity was a medical impairment. *Id.*

¹¹⁴ *Krein v. Marian Manor Nursing Home*, 415 N.W.2d 793, 796 (N.D. 1987). Like *Greene v. Union Pacific*, this case was brought under state discrimination law. The state law in question, however, provides that "[i]t is a discriminatory practice for an employer to fail or refuse to make reasonable accommodations for an otherwise qualified person with a physical or mental disability" N.D. CENT. CODE § 14-02.4-03 (2006). Moreover, the definition of disability provided in the North Dakota code is identical to the federal definitions in the ADA and RA. N.D. CENT. CODE § 14-02.4-02(5) ("Disability" means a physical or mental impairment that substantially limits one or

the plaintiff, weighed over three hundred pounds and claimed that she was discharged because of her obesity.¹¹⁵ The court did not dismiss the possibility that obesity could be a disability when it "significantly impair[ed] a person's abilities;"¹¹⁶ however, under these particular facts, the plaintiff did not show that her weight impacted or limited her in any way, or that her employer viewed her as such.¹¹⁷ Had this claim with these same facts been brought under the ADA, as opposed to state law, the result would have likely been the same, as the plaintiff failed to show that her weight substantially limited a major life activity.¹¹⁸

California has also determined that a showing of obesity alone does not automatically qualify a person as disabled.¹¹⁹ In *Cassista v. Community Foods*, Toni Cassista was five feet, four inches tall and weighed three hundred and five pounds.¹²⁰ She went to an interview for a position at Community Foods in which the employer asked her if she had any physical limitations, and she replied that she did not.¹²¹ She was not hired for the position, but when another position opened up several weeks later, she contacted the store's personnel coordinator to request that she be considered again for the position.¹²² Her application was submitted, and, again, she was not offered the job.¹²³ When she inquired as to the reason, the personnel coordinator informed her that there was a concern that she could not physically handle the work because of her weight.¹²⁴

Cassista filed suit under California's Fair Employment and Housing Act,¹²⁵ alleging discrimination because she was perceived as having a

more major life activities, a record of this impairment, or being regarded as having this impairment.").

¹¹⁵ *Krein*, 415 N.W.2d at 793.

¹¹⁶ *Id.* at 796.

¹¹⁷ *Id.*

¹¹⁸ For instance, the Eighth Circuit found that the ADA does not provide protection where the plaintiff fails to show a substantial limitation with regard to a major life activity. *Nuzum v. Ozark Auto. Distribs.*, 432 F.3d 839, 849 (8th Cir. 2005).

¹¹⁹ *Cassista v. Cmty. Foods, Inc.*, 856 P.2d 1143, 1153-54 (Cal. 1993).

¹²⁰ *Id.* at 1144.

¹²¹ *Id.* at 1145.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ CAL. GOV'T. CODE § 12900 *et seq.* (West 2006). Cassista brought suit under § 12921, which prohibits employment discrimination based on physical or mental disabilities. *Id.* at § 12921. California defines disability in a virtually identical manner to the ADA and RA. Compare CAL. GOV'T. CODE § 12926(k) (West 2006), with 42 U.S.C. § 12102(2) (2000).

disability by the employer.¹²⁶ The California Court of Appeals sympathized with Cassista's claim and held that "Community Foods considered Cassista's weight to be a physical handicap as that term [was] defined under the FEHA."¹²⁷ On appeal to the Supreme Court of California, however, Cassista's luck ran out. The court held that "it is not enough to show that an employer's decision is based on the perception that an applicant is disqualified by his or her weight. The applicant must be 'regarded as having or having had' a condition 'described in paragraph (1) or (2).'"¹²⁸ In other words, the court found that Cassista must have been regarded as having a physiological disease or disorder that affected a bodily system.¹²⁹ Translated to the words of the ADA, the California court essentially held that Community Foods had to have regarded Cassista's obesity as having a *physiological cause* in order for it to qualify under the definition of disability. Because she did not have medical testimony tending to prove a "cause" for her obesity, she was not considered to have a disability.¹³⁰ This reasoning has, in fact, gained strength and support in the federal circuit courts.¹³¹

The New Jersey Superior Court Appellate Division, however, did not require this complex factual finding when it held that Joe Gimello had been discriminated against by his employer, Agency Rent-A-Car, because of his obesity.¹³² When Gimello began his employment with Agency, he stated his weight on his application as 225 pounds.¹³³ Five years later, after years of being a record-breaking employee,¹³⁴ Gimello's weight had reached 324 pounds, and he was fired.¹³⁵ Testimony made it clear that his employer had been very uncomfortable with his weight.¹³⁶ Gimello brought suit claiming

¹²⁶ *Cassista v. Cmty. Foods, Inc.*, 10 Cal. Rptr. 2d 98, 101 (Cal. Ct. App. 1992).

¹²⁷ *Id.* at 105.

¹²⁸ *Cassista*, 856 P.2d at 1153.

¹²⁹ *Id.*

¹³⁰ *Id.* at 1153-54.

¹³¹ See, for example, *EEOC v. Watkins Motor Lines, Inc.*, 463 F.3d 436 (6th Cir. 2006), which will be discussed in depth *infra* Part IV.

¹³² *Gimello v. Agency Rent-A-Car Sys., Inc.*, 594 A.2d 264, 273 (N.J. Super. Ct. App. Div. 1991).

¹³³ *Id.* at 266.

¹³⁴ *Id.* at 266-67. During his years at Agency, Gimello consistently won accolades for his record sales of "Deductible Protection Coverage." Normal sales rates averaged around 50%. Gimello consistently exceeded performance expectations. *Id.* at 266. His success was rewarded with numerous raises, promotions, and bonuses. *Id.*

¹³⁵ *Id.* at 268-69.

¹³⁶ In fact, one of his superiors had testified that the high employee turnover rate at Gimello's office was "because of his size and appearance." *Id.* at 269. His constant comments about Gimello's weight led to the administrative law judge's finding that "his

both that his obesity was a disability and that he was perceived as having a disability by his employer. The court found that “he was fired because of this physical condition which his supervisors perceived as a defect and which did not in fact disqualify him in any proven sense”¹³⁷ Under New Jersey’s broad definition of “disability,”¹³⁸ the court found that obesity actually qualified as a disability.¹³⁹ The court did not, however, think that the “perceived disability” question was critical to their decision because Gimello’s obesity was demonstrated by uncontested medical evidence showing that his condition had causes other than sloth and overeating.¹⁴⁰ Gimello succeeded in proving that his obesity was in fact a physiological condition and therefore met the burden of proving it was a disability within the statutory definition.

Without underestimating the importance of the state statutory language, the success of obesity discrimination claims brought under state law has depended largely on the approach that the state court has taken to the claim. Where the court begins by noting that the plaintiff was denied a position for which he was otherwise qualified solely because of his weight, the plaintiff is likely to succeed because, regardless of whether his obesity was an actual disability, it was disabling in that context.¹⁴¹ As the cases below show, this approach seems to mirror federal cases brought under the “perceived disability” definition. On the other hand, where the state court focuses on the

concern with complainant’s weight was the primary reason for his subsequent actions to effectuate the termination of complainant’s employment.” *Id.* at 271.

¹³⁷ *Id.* at 273.

¹³⁸ N.J. STAT. ANN. § 10:5-5q (West Supp. 2007). The New Jersey statute defines disability in the following manner:

“Disability” means physical disability, infirmity, malformation or disfigurement which is caused by bodily injury, birth defect or illness including epilepsy and other seizure disorders, and which shall include, but not be limited to, any degree of paralysis, amputation, lack of physical coordination, blindness or visual impediment, deafness or hearing impediment, muteness or speech impediment or physical reliance on a service or guide dog, wheelchair, or other remedial appliance or device, or any mental, psychological or developmental disability resulting from anatomical, psychological, physiological or neurological conditions which prevents the normal exercise of any bodily or mental functions or is demonstrable, medically or psychologically, by accepted clinical or laboratory diagnostic techniques. Disability shall also mean AIDS or HIV infection.

Id. At the time of the *Gimello* decision, the New Jersey statute contained the term “handicap” rather than “disability.” N.J. STAT. ANN. § 10:5-5q (West 1990); *Gimello*, 594 A.2d at 274.

¹³⁹ *Gimello*, 594 A.2d at 276.

¹⁴⁰ *Id.* at 278.

¹⁴¹ *See id.* at 273.

medical aspects of obesity, as opposed to its social effects, and requires the plaintiff to show that the obesity has a physiological cause aside from the condition itself,¹⁴² success has been more elusive.

B. Federal Cases Where Obesity Was Not a Disability

William Tudyman was a flight attendant for United Airlines.¹⁴³ Unfortunately, he was fifteen pounds over the maximum weight established for his height by United Airlines' weight program for flight attendants and was released from his position.¹⁴⁴ Tudyman was not overweight in the conventional sense. Indeed, his weight was the result of avid bodybuilding, and actually resulted in a lower than normal percentage of body fat.¹⁴⁵ Nonetheless, he was terminated when he reached the maximum allowable weight.¹⁴⁶ Tudyman brought suit under section 504 of the RA,¹⁴⁷ alleging that he was discriminated against because United regarded him as having a disability. In its defense, United argued that it did not regard Tudyman as having a disability, but rather it viewed him as simply not meeting its weight requirements.¹⁴⁸ The court agreed, noting section 504's "Catch 22" aspect, requiring that even under the perceived disability definition, the plaintiff must show he has an impairment that substantially limited a major life activity.¹⁴⁹ According to the Court, failure to qualify for a single job did not substantially limit Tudyman's major life activity of working.¹⁵⁰ The court held that "[f]or the same reason that the failure to qualify for a single job does not constitute a limitation on a major life activity, refusal to hire someone for a single job does not in and of itself constitute perceiving the plaintiff as a handicapped individual."¹⁵¹ In other words, Tudyman did not meet the burden of proving that he had a disability.

¹⁴² See *Cassista v. Cmty. Foods, Inc.*, 856 P.2d 1143, 1153 (Cal. 1993).

¹⁴³ *Tudyman v. United Airlines*, 608 F. Supp. 739, 741 (C.D. Cal. 1984).

¹⁴⁴ *Id.* at 740-41.

¹⁴⁵ *Id.* at 741. United Airlines' policy was "motivated by a desire to assure the neat and pleasing appearance of its flight attendants." *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ Because United Airlines was receiving some federal monies, the RA applied. The standards used in determining a violation of this section are the same as those applied under Title 1 of the ADA. 29 U.S.C. § 794(d) (2000).

¹⁴⁸ *Tudyman*, 608 F. Supp. at 744 ("Defendant argues that plaintiff has no such limitation or impairment and that it does not so regard plaintiff. It only regards plaintiff as not meeting the weight restriction.").

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 746.

¹⁵¹ *Id.*

In *Torcasio v. Murray*, a prisoner filed suit under the RA claiming that he was due reasonable accommodation because it was “clearly established” that morbid obesity qualified as a disability under the Act.¹⁵² The Fourth Circuit rejected his claim on two fronts. Not only was it not “clearly established” that the RA applied to state prisons, but it was also not “clearly established” that morbid obesity was a disability under the Act.¹⁵³ In both *Torcasio* and *Tudyman*, the plaintiffs failed to prove that their obesity was an actual impairment under the Acts¹⁵⁴ and were thus denied statutory protection.

In 1997, seventy-six law enforcement officers brought suit against the State of Ohio alleging that they were discriminated against when they could not meet the weight requirement set for their particular jobs.¹⁵⁵ Citing the EEOC’s regulations defining “a person who is regarded as having such an impairment,”¹⁵⁶ the Sixth Circuit noted that to set forth a *prima facie* case of discrimination under the ADA or RA, “[the] plaintiffs must allege either that they are or are perceived to be handicapped within the definitions of each of the acts”¹⁵⁷ The court went on to hold that the officers did not meet the burden of showing that their weight was an impairment.¹⁵⁸ They based this finding on the EEOC’s guideline stating that “weight or muscle tone that are within ‘normal’ range and are not the result of a physiological disorder” are not impairments.¹⁵⁹ In fact, a strict reading of this guideline would seem to imply that weight that is not “within the normal range,” such as clinical obesity, or evidence that the weight condition was the result of a

¹⁵² *Torcasio v. Murray*, 57 F.3d 1340, 1342 (4th Cir. 1995). The plaintiff was five feet, seven inches tall and weighed 460 pounds. *Id.* Although the prison did make some accommodations for his size, he claimed that its denial of his request for a larger cell, wider entrances to showers, and alternative outdoor recreational activities was a violation of the RA. *Id.*

¹⁵³ *Id.* at 1343–44.

¹⁵⁴ The plaintiff in *Torcasio* did not make a fact-based attempt to prove that his impairment substantially limited a major life activity, but instead claimed that morbid obesity was a qualified disability as a matter of law. *Torcasio*, 57 F.3d at 1342. Likewise, the plaintiff in *Tudyman* did not make a showing that his employer regarded his weight as a disability within the definition. *Tudyman*, 608 F. Supp. at 746 (“Plaintiff has no physical impairment and is not substantially limited in any major life activity. Nor does defendant perceive plaintiff to have a physical impairment which limits his activities.”).

¹⁵⁵ *Andrews v. Ohio*, 104 F.3d 803, 805 (6th Cir. 1997).

¹⁵⁶ *Id.* at 807.

¹⁵⁷ *Id.* The plaintiffs, then, had to show that they had, or were perceived to have, an impairment that substantially limited them in a recognized major life activity. *Id.*

¹⁵⁸ *Id.* at 808.

¹⁵⁹ 29 C.F.R. app § 1630.2(h) (2007).

physiological disorder, would qualify as an impairment.¹⁶⁰ Nonetheless, the Sixth Circuit did not rule out that morbid obesity could be an impairment, although it emphasized that the plaintiff has the burden of offering evidence that the obesity was caused by a physiological condition.¹⁶¹

Obesity has not been dismissed as a disability per se in the federal courts. Instead, courts have been strict in requiring that each individual plaintiff show that his or her obesity was an impairment that substantially limited a major life activity, or was regarded as such. Where this factual showing has been met, courts have been more receptive to classifying obesity as a disability.

C. Federal Cases Where Obesity Was a Disability

The First Circuit was the first federal appellate court to recognize morbid obesity as a perceived disability.¹⁶² In *Cook v. Rhode Island*, the plaintiff prevailed under the perceived disability prong of the RA when the court held that her employer regarded her obesity as substantially limiting her in the major life activity of working.¹⁶³

Bonnie Cook was employed as an institutional attendant for the mentally handicapped at the Ladd Center from 1978 to 1980 and again from 1981 to 1986.¹⁶⁴ Her record was "spotless," and she departed both times voluntarily.¹⁶⁵ In 1988, Cook reapplied for an identical position.¹⁶⁶ At that time, "she stood 5'2" tall and weighed over 320 pounds."¹⁶⁷ The nurse who conducted her routine, pre-hire physical noted that Cook was morbidly obese, but found no limitations that would affect her ability to do her job.¹⁶⁸

¹⁶⁰ The regulation in question attempts to distinguish between actual impairments and mere physical characteristics. In so doing, it points out that eye color and normal weight are not impairments and are not the result of a physiological disorder. Common canons of interpretation would suggest that by stating that "normal weight" is not an impairment, the implication is that "abnormal" weight may be an impairment.

¹⁶¹ *Andrews*, 104 F.3d at 809 (citing *Cook v. R.I., Dep't of Mental Health, Retardation, & Hosps.*, 10 F.3d 17, 25 (1st Cir. 1993)).

¹⁶² Taussig, *supra* note 100, at 928 (noting that in 1993, the First Circuit "became the first United States Court of Appeals to acknowledge morbid obesity as a disability under federal disability law").

¹⁶³ *Cook v. R.I., Dep't of Mental Health, Retardation, & Hosps.*, 10 F.3d 17, 20–21 (1st Cir. 1993).

¹⁶⁴ *Id.* at 20.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Cook*, 10 F.3d at 20–21.

Notwithstanding the nurse's finding, the Department of Mental Health, Retardation, and Hospitals (MHRH), who ran the Ladd Center, disagreed.¹⁶⁹ MHRH "claimed that Cook's morbid obesity compromised her ability to evacuate patients" in an emergency¹⁷⁰ and "put her at greater risk of developing serious ailments."¹⁷¹ They refused to rehire Cook.¹⁷² Cook filed suit in federal court, alleging discrimination in violation of section 504 of the RA.¹⁷³ She claimed that she was fully qualified and able to perform the job, but that MHRH regarded her as physically impaired because of her obesity.¹⁷⁴ The jury agreed, and the case was appealed to the First Circuit.¹⁷⁵

In what can only be described as a victory for the obese, the First Circuit affirmed the jury's verdict and held that the jury "could plausibly have found that [Cook] had a physical impairment."¹⁷⁶ Moreover, the court dispelled the argument that mutable conditions cannot be impairments protected by the ADA and the RA,¹⁷⁷ and dismissed the claim that, because it may be the result of voluntary conduct, morbid obesity is not covered by the Act.¹⁷⁸ In fact, in addressing the voluntariness argument, the court actually compared obesity to "alcoholism, AIDS, diabetes, [and] cancer resulting from smoking,"¹⁷⁹ noting that these conditions are undoubtedly caused by voluntary conduct, but that the Act nonetheless indisputably covers them.¹⁸⁰

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ 29 U.S.C. § 794(a) (2000) (providing in part that "[n]o otherwise qualified individual . . . shall, solely by reason of her . . . disability, . . . be subjected to discrimination under any program or activity receiving Federal financial assistance").

¹⁷⁴ *Cook*, 10 F.3d at 22.

¹⁷⁵ *Id.* at 21. The trial court reserved decision, and instead submitted the case on special interrogatories. "The jury answered the interrogatories favorably to plaintiff and, by means of the accompanying general verdict, awarded her \$100,000 in compensatory damages." *Id.* The trial court entered judgment on the verdict. *Id.*

¹⁷⁶ *Id.* at 23.

¹⁷⁷ *Id.* at 24. "Mutability is nowhere mentioned in the statute or regulations, and we see little reason to postulate it as an automatic disqualifier under section 504. It seems to us, instead, that mutability is relevant only in determining the substantiality of the limitation flowing from a given impairment." *Id.* at 23 n.7.

¹⁷⁸ *Id.* at 24 ("[V]oluntariness, like mutability, is relevant only in determining whether a condition has a substantially limiting effect.").

¹⁷⁹ *Id.* at 24.

¹⁸⁰ *Cook*, 10 F.3d at 24.

Cook, then, passed the hurdle of showing that her obesity was an impairment under the regulatory definition.¹⁸¹ Additionally, statements made by her employer made it clear that he regarded her as substantially limited in the major life activity of working.¹⁸² Therefore, because the jury could reasonably have found that she had a disability under the statute and she showed that she was “otherwise qualified” for the job,¹⁸³ the Act applied and she was protected from discrimination based on her disability.

This victory, however, is tempered somewhat by the court’s heavy reliance on the fact that Cook presented substantial medical testimony that morbid obesity “is a physiological disorder involving a dysfunction of both the metabolic system and the neurological appetite-suppressing signal system”¹⁸⁴ In other words, the decision did not accept obesity as an impairment as a matter of law, but instead relied on Cook’s individual situation and thus limited the decision to the facts of her case.¹⁸⁵

As a side note, the EEOC filed an important brief as *amicus curiae* in the *Cook* decision, in which it supported Cook’s claim by arguing that morbid obesity should be an actual disability under the ADA.¹⁸⁶ The brief argued that, although analysis should continue on a case-by-case basis, “obesity may be a disability under the [Act] if it constitutes an impairment and if it is of such duration that it substantially limits a major life activity or is regarded as so doing.”¹⁸⁷ Some viewed this brief as a switch in the EEOC’s classification of obesity.¹⁸⁸ In support of this view, a more recent clarification of the term disability by the EEOC reinforces the argument that, while being overweight alone is generally not an impairment, severe or morbid obesity “*is clearly an impairment*.”¹⁸⁹ The EEOC’s position is important in that it represents the

¹⁸¹ See 45 C.F.R. § 84.3(j)(2) (2006).

¹⁸² *Cook*, 10 F.3d at 25 (“Dr. O’Brien believed [Cook’s] limitations foreclosed a broad range of employment options in the health care industry, including positions such as community living aide, nursing home aide, hospital aide, and home health care aide.”).

¹⁸³ *Id.* at 28.

¹⁸⁴ *Id.* at 23.

¹⁸⁵ *Id.* at 26.

¹⁸⁶ See Buxton, *supra* note 99, at 119.

¹⁸⁷ Brief of the EEOC as *Amicus Curiae* at 11, *Cook v. R.I., Dep’t of Mental Health, Retardation, & Hosps.*, 10 F.3d 17 (1st Cir. 1993) (No. 93-1093), 1993 WL 13625007; see also Frisk, *supra* note 62, at 17.

¹⁸⁸ Buxton, *supra* note 99, at 119 (arguing that the EEOC reversed its opinion “without warning”).

¹⁸⁹ U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, COMPLIANCE MANUAL add. § 902, <http://www.eeoc.gov/policy/docs/902cm.html> (under Section 902.2(c)(5)(ii)) (last modified on Feb.1, 2000) (emphasis added).

first, and only, federal agency recognition of morbid obesity as a qualifying impairment.

In *EEOC v. Texas Bus Lines*, a federal court again found that obesity qualified under the ADA as a disability on a fact-specific basis.¹⁹⁰ Like in *Cook*, the plaintiff in *Texas Bus Lines* succeeded under the perceived definition of disability.¹⁹¹ Moreover, this case was brought by the EEOC on the complainant's behalf, reinforcing the agency's support of including morbid obesity as a disability protected by the ADA.¹⁹²

Arazella Manuel applied for employment with Texas Bus Lines in 1994 for a position that would require her to drive a passenger van between several hotels and the airport.¹⁹³ At 5'4" and 345 pounds, Manuel was morbidly obese.¹⁹⁴ She was interviewed, her references were checked, and she successfully passed a road test.¹⁹⁵ She was then required to undergo a physical examination, per Department of Transportation regulations.¹⁹⁶ The examining physician declared her to be "disqualified" and refused to issue her the required certificate.¹⁹⁷ He based his refusal on his belief that she "would not be able to move swiftly in the event of an accident."¹⁹⁸ Based on the doctor's findings, Texas Bus Lines refused to hire Manuel, claiming she was uninsurable.¹⁹⁹

The EEOC filed suit on Manuel's behalf, arguing that "Texas Bus Lines' refusal to hire Manuel constitute[d] a violation of the [ADA]" since its refusal was based on the perception that her obesity was a disability.²⁰⁰ The court was quick to pass Manuel through the threshold burdens of proving that she had a disability and was "otherwise qualified" for the position. Addressing the issue of her obesity as a disability, the court cited the EEOC regulations for "being regarded as having such an impairment"²⁰¹ and found that an individual who is denied a job based on stereotypes of disabilities would be covered under the "regarded as" definition regardless of whether that individual's condition would meet the burden under the first or second

¹⁹⁰ *EEOC v. Tex. Bus Lines*, 923 F. Supp. 965 (S.D. Tex. 1996).

¹⁹¹ *Id.* at 974.

¹⁹² *Id.* at 965.

¹⁹³ *Id.* at 967.

¹⁹⁴ *Id.* at 967 & n.1.

¹⁹⁵ *Id.* at 967.

¹⁹⁶ *Tex. Bus Lines*, 923 F. Supp. at 967.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* at 967-68.

²⁰⁰ *Id.* at 968.

²⁰¹ *Id.* at 974 (citing 29 C.F.R. § 1630.2(l)).

definitions.²⁰² In other words, the EEOC was not required to show that Manuel's obesity was an actual impairment, but only that the employment decision was made "because of a perception of disability based on 'myth, fear or stereotype.'" ²⁰³ As for showing that Manuel was "otherwise qualified" for the job, the court found that "the only obstacle to the required . . . certification was both Texas Bus Lines and [the doctor's] perceived and mistaken belief that Manuel was disabled as a result of her obesity."²⁰⁴ Manuel met all other qualifications.²⁰⁵

It is worth noting that the EEOC did not argue in *Texas Bus Lines* that morbid obesity was an actual disability. Rather, it simply argued that Manuel had been perceived as disabled.²⁰⁶ In holding that she had been perceived as disabled, the court was careful to spell out that "courts as well as the ADA have consistently rejected obesity as a disability protected by the ADA."²⁰⁷

It seems that the Ninth Circuit, however, would disagree that obesity has been "consistently" rejected as a protected disability. In *Gaddis v. Oregon* the court based its opinion on the assumption that morbid obesity was a disability under the ADA.²⁰⁸ The opinion opened by stating that the plaintiff suffered from "morbid obesity, a disability under the Americans with Disabilities Act of 1990."²⁰⁹ Interestingly, the court does not cite case law for this proposition, nor is there any indication that the plaintiff presented evidence tending to prove he had a disability under the definition. Instead, it cites to the ADA itself—which does not mention obesity.²¹⁰

The Ninth Circuit appears to be an anomaly in accepting the plaintiff's morbid obesity as a disability without a particularized factual finding of a physiological cause for the obesity, or that the employer regarded the

²⁰² *Tex. Bus Lines*, 923 F. Supp. at 975 (citing *Sch. Bd. of Nassau County v. Arline*, 480 U.S. 273, 283 (1987) ("Such an impairment might not diminish a person's physical or mental capacities, but could nevertheless substantially limit that person's ability to work as a result of the negative reactions of others to the impairment.")). The Sixth Circuit has interpreted this definition to require a finding of an actual impairment. See discussion of *EEOC v. Watkins Motor Lines*, *infra* Part IV.

²⁰³ *Tex. Bus Lines*, 923 F. Supp. at 975.

²⁰⁴ *Id.* at 971.

²⁰⁵ *Id.*

²⁰⁶ See, e.g., Kari Horner, Comment, *A Growing Problem: Why the Federal Government Needs to Shoulder the Burden in Protecting Workers from Weight Discrimination*, 54 CATH. U. L. REV. 589, 599 (2005).

²⁰⁷ *Tex. Bus Lines*, 923 F. Supp. at 975 (citing *Torcasio v. Murray*, 57 F.3d 1340, 1354 (4th Cir. 1995) (holding that obesity *alone* is not a disability) (emphasis added)).

²⁰⁸ *Gaddis v. Oregon*, 21 F. App'x 642, 643 (9th Cir. 2001) (unpublished).

²⁰⁹ *Id.*

²¹⁰ *Id.* (citing 42 U.S.C. §§ 12101–12122.3 (2000)).

plaintiff as having a disability. Of the cases in which obesity has been protected under the ADA, the majority of successful plaintiffs have either shown that their own obesity has a physiological cause,²¹¹ or that they were regarded by their employer as substantially limited in a major life activity due to their obesity.²¹²

The qualified success of obesity discrimination suits in the federal courts raises questions as to the repercussions of classifying morbid obesity as a disability. To date, aside from the Ninth Circuit,²¹³ no court has actually declared morbid obesity to be a disability. Instead, aggrieved individuals have prevailed under the perceived disability prong of the definition. In Part V, this Note will argue that this approach strikes the appropriate balance between allowing recovery for discrimination based on a perceived disability and holding back the flood of suits that could arise if obesity were declared an actual disability.²¹⁴

D. Obesity and the Air Carrier Access Act

A rampant misperception about the repercussions of classifying obesity as a disability is the idea that the obese would then be given first-class airline seats to accommodate their size, or in the alternative, that they would be guaranteed an empty seat next to them on a full flight while normal-sized patrons are squeezed in three to a row. In fact, airlines are not governed by the ADA. "[A]irlines were specifically excluded from the application of the ADA because Congress had already passed legislation to deal with handicapped airline travelers: the Air Carrier Access Act of 1986 (ACAA)."²¹⁵ Like the ADA, the ACAA seeks to prevent discrimination against individuals with disabilities and defines disability identically to the ADA and the RA.²¹⁶ Therefore, in order to be protected by the ACAA, the complaining individual must show that he or she has a disability, a formidable hurdle for the obese.

The airlines face their own dilemma in trying to accommodate both their obese passengers and average-sized passengers. With America's ever-expanding waistline, they have a difficult task in keeping all of their customers happy. To achieve this balance, many airlines rationalize that

²¹¹ See, e.g., *Cook v. v. R.I., Dep't of Mental Health, Retardation, & Hosps.*, 10 F.3d 17 (1st Cir. 1993).

²¹² See, e.g., *EEOC v. Tex. Bus Lines*, 923 F. Supp. 965 (S.D. Tex. 1996).

²¹³ *Gaddis*, 21 F. App'x. at 642.

²¹⁴ The phrase "actual disability" used here refers to prong (a) of the ADA's definition of a disability. 42 U.S.C. § 12102(2)(A) (2000).

²¹⁵ *Lynch*, *supra* note 13, at 233.

²¹⁶ 49 U.S.C. § 41705(a) (2000).

“when purchasing a seat, passengers actually purchase two products: transport to a destination and a space to occupy during the journey.”²¹⁷ In line with this reasoning, airlines have instituted a policy that requires the obese to purchase two seats. Southwest Airlines, for instance, requires its obese passengers to purchase two seats in advance.²¹⁸ Should the flight take off with empty seats, the cost of the second seat will be refunded.²¹⁹ The definitive gauge is not passengers’ actual weight, but whether they can put down the armrest between themselves and the passenger next to them.²²⁰ This policy applies regardless of whether the passenger is obese, pregnant, or simply broad-shouldered.²²¹ Although other airlines have similar policies, Southwest has been criticized because of its increased vigilance in enforcing its policy.²²² Even Jay Leno poked fun at the policy, saying, “Boy, Southwest is cracking down on overweight passengers. Now any fat people standing in front of the terminal for more than 15 minutes will be towed.”²²³

Under the ADA, a covered entity is expected to build the price of a reasonable accommodation into its pricing scheme.²²⁴ For example, people who need wheelchairs are not required to pay for the extra space that the chair occupies.²²⁵ It is because obesity has never been declared a disability that policies like the one implemented by Southwest Airlines are allowed. Otherwise, one could argue that the airlines would be required to eat the cost of the extra seat, as they do space for a wheelchair. However, because obesity itself is not a disability under the federal definitions, the airlines have struck a balance by refunding the price whenever the flight is not full.²²⁶

²¹⁷ Buxton, *supra* note 99, at 124.

²¹⁸ See Southwest.com. Customer of Size Q&A, http://www.southwest.com/travel_center/cos_qa.html (last visited Nov. 27, 2007).

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ *Id.*

²²² Dan Fitzpatrick, *Weighty Matter Pits Passengers Against Airlines*, PITT. POST-GAZETTE, Mar. 13, 2005, at A-1, available at <http://www.post-gazette.com/pg/05072/470035.stm>.

²²³ *Id.* at A-15.

²²⁴ LESLIE PICKERING FRANCIS & ANITA SILVERS, AMERICANS WITH DISABILITIES: EXPLORING IMPLICATIONS OF THE LAW FOR INDIVIDUALS AND INSTITUTIONS 93 (2000) (“A customer or employee is entitled by the ADA to reasonable accommodation in the sense that the public accommodation owner or employer must treat the customer or worker in terms of his or her gross, not net, value added to the firm.”).

²²⁵ See 14 C.F.R. pt. 382 (2006) (prohibiting discrimination against disabled individuals and requiring airlines to have space for wheelchairs on the aircraft).

²²⁶ Fitzpatrick, *supra* note 222; Southwest Airlines Travel Policies, *supra* note 218.

The criticism of these policies may well be unwarranted. In order to remain a low-fare air carrier, Southwest has to make the most out of the space that it has available. Selling two seats for the price of one would inevitably lower profits for the airline, and as a consequence raise airfares for all passengers. A company spokesperson has noted that “[f]or every 10 letters [they] get, nine of them will say they did not enjoy their flight because someone was sitting on them.”²²⁷ Moreover, its website notes that 98% of extra seat purchases qualify for the refund.²²⁸ This accommodation seems reasonable and is supported by the ACAA’s implementing regulations.²²⁹

IV. EEOC v. WATKINS MOTOR LINES AND THE CURRENT STATE OF OBESITY AS A PERCEIVED DISABILITY

The Sixth Circuit was the most recent federal court to test the boundaries of obesity as a disability under the ADA. Following a similar line of reasoning as the California Supreme Court in *Cassista v. Community Foods*,²³⁰ the Sixth Circuit continues to insist that each individual obese plaintiff filing suit for employment discrimination under Title I of the ADA prove that his or her obesity has a physiological cause, regardless of which definition of disability they are attempting to prove.²³¹

In 1990, Stephen Grindle was hired by Watkins Motor Lines (Watkins) as a dock worker.²³² At that time, Grindle weighed 345 pounds.²³³ His job description included “climbing, kneeling, bending, stooping, balancing, reaching, and repeated heavy lifting.”²³⁴ Grindle successfully performed these duties for five years until 1995, when he nearly fell off a ladder after a rung broke injuring his knee.²³⁵ He returned to work the day after the

²²⁷ Fitzpatrick, *supra* note 222.

²²⁸ Southwest Airlines Travel Policies, *supra* note 218.

²²⁹ In fact, the implementing regulations specifically provide that “[c]arriers are not required to furnish more than one seat per ticket or to provide a seat in a class of service other than the one the passenger has purchased.” 14 C.F.R. § 382.38(i) (2006).

²³⁰ *Cassista v. Cmty. Foods, Inc.*, 856 P.2d 1143, 1153 (Cal. 1993).

²³¹ *EEOC v. Watkins Motor Lines, Inc.*, 463 F.3d 436, 442–43 (6th Cir. 2006). This reasoning is consistent with the court’s decision in *Andrews v. Ohio*, 104 F.3d 803, 808–09 (6th Cir. 1997), in which the court also insisted that the aggrieved policemen show that their obesity had physiological causes—regardless of whether they were bringing the claim under the perceived disability prong.

²³² *Watkins Motor Lines*, 463 F.3d at 438.

²³³ *Id.*

²³⁴ *Id.*

²³⁵ *Id.*

incident and continued to work overtime hours throughout the month.²³⁶ He then went on a leave of absence to recover from the injuries he sustained.²³⁷

Watkins had a policy that required termination of any employee who remained on leave of absence for more than 180 days.²³⁸ Grindle was given a return to work release from Dr. Zancan days before his time was up, but Watkins refused to accept it, arguing that Zancan had not reviewed Grindle's job description prior to signing it.²³⁹ Instead, Watkins ordered Grindle to see its own expert, Dr. Lawrence. In his evaluation of Grindle, Dr. Lawrence noted that "the most notable item is that the patient weighs 405 [pounds]."²⁴⁰ Based on his evaluation of Grindle, Dr. Lawrence concluded that even though Grindle met all Department of Transportation standards, "he could not safely perform the requirements of his job."²⁴¹ Grindle was then placed on safety hold, surpassed the 180-day leave of absence maximum, and was terminated.²⁴²

Grindle registered a complaint with the EEOC, which filed suit on his behalf, claiming that Watkins had violated the ADA when it regarded Grindle's obesity as a disability and mistakenly believed that he could not perform his job.²⁴³ The district court granted Watkins's motion for summary judgment, "finding that non-physiologically caused obesity is not an 'impairment' under [the] ADA."²⁴⁴ The EEOC appealed to the Sixth Circuit.

The Sixth Circuit noted that there are two separate ways that an individual without a disability could be covered by the ADA: "(1) a covered entity mistakenly believes that a person has a physical impairment that substantially limits one or more major life activities, or (2) a covered entity mistakenly believes that an actual, nonlimiting impairment substantially limits one or more major life activities."²⁴⁵ The EEOC made its argument under the second definition.²⁴⁶ Thus, the court reasoned that to succeed, the

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ *Watkins Motor Lines*, 463 F.3d at 438.

²³⁹ *Id.*

²⁴⁰ *Id.* at 439.

²⁴¹ *Id.*

²⁴² *Id.*

²⁴³ *Id.*

²⁴⁴ *Watkins Motor Lines*, 463 F.3d at 439.

²⁴⁵ *Id.* at 440 (citing *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 489 (1999)).

²⁴⁶ *Id.* The EEOC would have had a much easier, and perhaps more successful, argument had it brought the claim under the first definition. There, it would only have had to prove that Watkins regarded Grindle's obesity as a substantially limiting impairment, an argument that was successfully made on similar facts in *EEOC v. Texas*

EEOC must establish that Grindle was perceived to be substantially limited by an actual impairment.²⁴⁷

The court dismissed the EEOC's argument that an impairment can be shown by either proving a physiological condition or by simply showing that the plaintiff is morbidly obese, as is suggested by the EEOC's own regulation.²⁴⁸ Instead, it noted that "physical characteristics that are not the result of a physiological disorder are not considered impairments for the purposes of determining either actual or perceived disability."²⁴⁹ Unlike the Ninth Circuit,²⁵⁰ the Sixth Circuit in *Watkins* did not accept morbid obesity as an impairment as a matter of law, thus perpetuating the need for a case-by-case analysis of obesity suits—requiring even morbidly obese plaintiffs to prove a physiological cause for their condition.

V. THE UNCERTAIN FUTURE OF OBESITY AS A DISABILITY

Although an increasing number of courts now require an obese individual to prove that his or her obesity has a physiological cause in order to receive the protection of the ADA, it is unclear why these same courts have consistently failed to recognize the ever-growing scientific evidence tending to prove that morbid obesity itself is a disease with physiological causes and consequences. Requiring additional evidence of a physiological cause for a clearly physiological disease seems to be not only redundant, but inherently unfair. As one author suggested, "the courts' insistence on

Bus Lines, 923 F. Supp. 965, 975–79 (S.D. Tex. 1996). Instead, following the argument it made in its amicus curiae brief for *Cook v. Rhode Island*, the EEOC attempted to persuade the court that morbid obesity was a disability as a matter of law. Frisk, *supra* note 62, at 17.

²⁴⁷ *Id.*

²⁴⁸ *Id.* at 441–42. Similar reasoning was used by the court in *Andrews v. Ohio*, where it held that to succeed even under the perceived disability prong, the plaintiff would have to show that his obesity had a physiological cause. *Andrews v. Ohio*, 104 F.3d 803, 807 (6th Cir. 1997). Interestingly, this reasoning is based on the EEOC's regulation, which by its plain language would imply that the plaintiff could show *either* morbid obesity or a physiological cause. 29 C.F.R. app. § 1630.2(h) (2007):

It is important to distinguish between conditions that are impairments and physical, psychological, environmental, cultural and economic characteristics that are not impairments. The definition of the term "impairment" does not include physical characteristics such as eye color, hair color, left-handedness, or height, weight or muscle tone that are within "normal" range and are not the result of a physiological disorder.

²⁴⁹ *Watkins Motor Lines*, 463 F.3d at 442 (citing *Andrews*, 104 F.3d at 808) (internal citations omitted).

²⁵⁰ *Gaddis v. Oregon*, 21 F. App'x 642, 643 (9th Cir. 2001) (unpublished).

identifying an underlying physiological disorder may reflect a societal desire to avoid according legal protections to persons whose obesity can be attributed to their own sloth, gluttony or lack of self-discipline rather than any 'medical' cause."²⁵¹

The purpose of the ADA is to "provide a clear and comprehensive national mandate to end discrimination against individuals with disabilities"²⁵² and to protect those people who suffer from stigmatized conditions.²⁵³ Evidence overwhelmingly shows that the obese suffer the consequences of this stigmatization in employment situations, including lower wages and the denial of insurance benefits.²⁵⁴ "It would be difficult, for example, to claim that the exaggerated solicitude displayed toward people with serious cardiovascular or lower-back impairments is more invidious than the revulsion and contempt displayed towards [an obese woman]."²⁵⁵ Hence, under the rationale of stigmatization, obesity is a perfect candidate for the ADA's protection.

However, the courts' hesitance to recognize obesity as an actual disability goes beyond discriminatory stereotypes. A major concern of accepting obesity as a disability, even just morbid obesity as the EEOC advances, has to do with the possibility of a large increase in litigation.²⁵⁶ When the ADA was first passed into law, Congress spoke of 43 million Americans with disabilities.²⁵⁷ Including the obese in that figure would add approximately an additional 59 million Americans²⁵⁸ to the number, more

²⁵¹ FRANCIS & SILVERS, *supra* note 224, at 120.

²⁵² H.R. REP. NO. 101-485, pt. 2, at 22 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 303, 332.

²⁵³ Sch. Bd. of Nassau County, Fla. v. Arline, 480 U.S. 273, 284 (1987) (noting that the basic purpose of the RA "is to ensure that handicapped individuals are not denied jobs or other benefits because of the prejudiced attitudes or the ignorance of others.").

²⁵⁴ See Rebecca Puhl & Kelly D. Brownell, *Bias, Discrimination, and Obesity*, 9 OBESITY RES. 788, 790-95 (2001), *available at* <http://www.obesityresearch.org/cgi/reprint/9/12/788>.

²⁵⁵ FRANCIS & SILVERS, *supra* note 224, at 151.

²⁵⁶ Francis v. City of Meriden, 129 F.3d 281, 287 (2d Cir. 1997) ("This would make the central purpose of the statutes, to protect the disabled, incidental to the operation of the 'regarded as' prong, which would become a catch-all cause of action for discrimination based on appearance, size, and any number of other things far removed from the reasons the statutes were passed.").

²⁵⁷ 42 U.S.C. § 12101 (2000). Though this number was not intended to be a cap on the number of recognized disabilities, it is an indication of the severity of conditions that the Act was intended to cover.

²⁵⁸ NAASO: The Obesity Society, What is Obesity <http://www.obesity.org> (click on "About Obesity" on the side bar, the "Fact Sheets" in the center, then "What is Obesity?") (last visited Nov. 27, 2007).

than twice that which the authors of the Act had in mind. Not only does including the obese exponentially increase the possible number of discrimination suits, but it risks skyrocketing costs and diluting judicial resources. Concerning the Supreme Court's decision in *Sutton*,²⁵⁹ a quadriplegic man wrote to the *New York Times* that "the effect of diluting the definition of disability by including nearly half of the population would ultimately . . . hurt those who need accommodation the most."²⁶⁰

The trick, then, is to provide protection to obese individuals who have been discriminated against because of stereotypes and misperceptions about the condition of obesity without opening the flood gates to including obesity itself as an actual disability. Currently, courts seem to be most comfortable proceeding with obesity suits under the "perceived as" definition of disability.²⁶¹ In so doing, they have declined to find obesity as an actual disability, but have instead recognized it as disabling in certain contexts, through the attitudes and actions of others.

To be covered under the perceived disability prong, however, an increasing number of courts have read the statute to require a plaintiff to allege that his or her employer "regarded him as having an 'impairment' within the meaning of the statute[]." ²⁶² In other words, the employer must have regarded the obese individual as having a condition that would be otherwise covered by the Act. Coming full circle, the court then requires the plaintiff to show that his obesity is an actual "impairment" under the Act.²⁶³ This has been interpreted to require a showing of a physiological cause.²⁶⁴

Courts hearing obesity discrimination suits under the ADA should heed the EEOC's advice and recognize morbid obesity as an impairment as a matter of law. Recognizing it as a disease that necessarily has a physiological cause would simply alleviate the need for each individual plaintiff to prove a medical cause for his or her own condition, but would still require a showing that the condition was disabling through the views and attitudes of others.

²⁵⁹ *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 475 (1999) (holding that the finding of a disability should be determined with regard to the corrective measures available to an individual and that an impairment did not exist where the plaintiff's vision was almost perfect with corrective glasses).

²⁶⁰ FRANCIS & SILVERS, *supra* note 224, at 153.

²⁶¹ *EEOC v. Watkins Motor Lines*, 463 F.3d 436, 440–43 (6th Cir. 2006); *Cook v. R.I., Dep't of Mental Health, Retardation, & Hosps.*, 10 F.3d 17, 24 (1st Cir. 1993); *EEOC v. Tex. Bus Lines*, 923 F. Supp. 965, 975–76 (S.D. Tex. 1996).

²⁶² *Francis v. City of Meriden*, 129 F.3d 281, 285 (2d Cir. 1997). *See also* *Andrews v. Ohio*, 104 F.3d 803, 808 (6th Cir. 1997); *Tudyman v. United Airlines*, 608 F. Supp. 739, 743–44 (C.D. Cal. 1984).

²⁶³ *Watkins Motor Lines*, 463 F.3d at 441–443.

²⁶⁴ *See, e.g., Andrews v. Ohio*, 104 F.3d 803, 809–10 (6th Cir. 1997).

This would address the concern of disabling stereotypes about the obese through the perceived disability definition without opening the door to claims under the actual disability definition. An overweight individual who does not qualify as morbidly obese would still need to show that his condition is the result of a physiological disorder.²⁶⁵ Moreover, because all potential plaintiffs would still be required to show that they were regarded by their employers as substantially limited in a major life activity, and that they are otherwise qualified for the job, it is unlikely that accepting it as an impairment would have an effect on the number of obesity discrimination suits under the perceived definition.

To be clear, this is an argument for continuing to address obesity suits under the perceived disability definition. Therefore, recognizing morbid obesity as an impairment would not make Homer Simpson's quest²⁶⁶ for "accommodation" much easier, as he did not suffer the consequences of his employer's perceptions. "[O]besity is increasingly viewed as a medical disability."²⁶⁷ Accepting that clinical morbid obesity should always be an impairment is not to say that it will always be a disability. In line with the purpose of the perceived disability definition,²⁶⁸ courts have been sympathetic to obesity suits under that definition if there is a physiological cause.²⁶⁹ In these cases where the plaintiff simply seeks to prevent a discriminatory employment practice, morbid obesity should be accepted as physiological. While the courts are right to proceed cautiously in allowing obesity discrimination suits, acknowledging that morbid obesity as a general condition is physiological would not open the door to suits under the actual disability definition of the ADA.²⁷⁰ Rather, it would recognize what is quickly becoming a medical certainty,²⁷¹ and ease the plight for those who suffer the consequences of "society's accumulated myths and fears"²⁷² that can be just as disabling as more traditionally accepted disabilities in the workplace.

²⁶⁵ Kuss, *supra* note 10, at 589.

²⁶⁶ *The Simpsons*, *supra* note 1.

²⁶⁷ Kuss, *supra* note 10, at 604.

²⁶⁸ See H.R. REP. NO. 101-485, pt. 2, at 52 (1990).

²⁶⁹ See, e.g., *EEOC v. Watkins Motor Lines, Inc.*, 463 F.3d 436, 440-43 (6th Cir. 2006); *Cook v. R.I., Dep't of Mental Health, Retardation, & Hosps.*, 10 F.3d 17, 20-24 (1st Cir. 1993); *EEOC v. Tex. Bus Lines*, 923 F. Supp. 965, 975-76 (S.D. Tex. 1996).

²⁷⁰ 42 U.S.C. § 12102(2) (2000).

²⁷¹ *The New England Journal of Medicine* has a collection of more than 80 articles discussing the causes and effects of obesity. See *The New England Journal of Medicine*, Collections by Disease or Topic: Obesity, <http://content.nejm.org/cgi/collection/obesity> (last visited Nov. 27, 2007).

²⁷² H.R. REP. NO. 101-485, pt. 2, at 53 (1990).

